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SUPREME COURT, U.S.

No. 97-2063

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioner*

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER, AND MICHAEL AVERY, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents contend that the circuit court's rulings are well within the mainstream of class action jurisprudence and that, in any event, there is no pressing need to resolve the issues raised in the petition now rather than after trial. There is no better answer to that contention than the nine amicus briefs filed in support of the petition. Not only are the members of the insurance industry and the broader business community united in the position that this case is of extraordinary significance and should be immediately resolved. That view is shared by four public interest groups that the Court would not typically expect to be supporting an insurer's petition — Public Citizen, the Center for Auto Safety, the Consumer Federation of America, and the Massachusetts Public Interest Research Group — who support certiorari because "the legal issues raised by the petition are recurring and important and the Court's resolution of them will * * * help curb abuse in *both* state and federal courts" (Public Citizen et al. Am. Br. 4).

In addition, the umbrella organization for state insurance commissioners, the National Association of Insurance Commissioners ("NAIC"), which "supports the use of class action lawsuits brought by insurance consumers under certain conditions" (NAIC Am. Br. 1), urges immediate review because, "if this nationwide class action is allowed to proceed, it could establish a precedent that would undermine our system of state-by-state insurance regulation, as the laws of particular states are trumped or re-trumped in patchwork fashion in nationwide class actions that attack, as this class action attacks, insurer conduct that is treated differently by the different states" (*id.* at 9). And four States, all of which already were represented in the NAIC brief, felt so strongly about the pernicious consequences of the ruling below that they filed two additional amicus briefs emphasizing the seriousness of this matter. The legislators responsible for enacting state insurance laws also are concerned about the circuit court's decision to exalt Illinois' laws over those of every other State and warn that "[t]hese issues will elude the Court unless certiorari is granted interlocutorily at the class certification stage." National Conference of Insurance Legislators ("NCOIL") Am. Br. 10.

As the amici emphasize, the circuit court's rulings threaten to have devastating repercussions for the multi-state system of regulating insurance, to force nationwide discontinuation of an

unambiguously pro-consumer practice, and to disregard the due process rights of both State Farm and the members of the class. The arguments offered by respondents in their effort to fend off certiorari are based on distortions of the relevant procedural facts and applicable legal principles. When these distortions are corrected, the appropriateness of either summary reversal or plenary review becomes clear.

1. *Jurisdiction*. Respondents are simply wrong in claiming (Opp. 7-12) that a state court's denial of mandamus, prohibition and/or a writ of supervision is not a final judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. It has long been established that "[p]rohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *." *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916).[1]

Respondents' effort (Opp. 12) to distinguish this long line of cases is unavailing. Contrary to respondents' evident assumption, Section 1257 does not require that the federal *issue* be finally decided, but rather that the state court *proceeding* be final. *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829) ("If [the predecessor to Section 1257] were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended."). Because an

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[1] See also, *e.g.*, *Detroit & M. Ry. v. Michigan R.R. Comm'n*, 240 U.S. 564, 571 (1916) ("it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute"); *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200, 206 (1924) ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Michigan Central R.R. v. Mix*, 278 U.S. 492, 494 (1929) (state supreme court's unexplicated denial of defendant's application for a writ of prohibition "is final within the meaning of § 237a of the Judicial Code"); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237 (a) of the Judicial Code."); cases and authorities cited at Pet. 1.

application for mandamus, prohibition or a supervisory writ is an independent, original action in the state supreme court, the denial of such an application is a final judgment that terminates that proceeding. For that reason, the Court has found itself to have jurisdiction to review denials of prohibition even when it clearly would have been possible for the aggrieved party to raise the federal issue on a direct appeal and then pursue review in this Court. See, *e.g.*, *Bandini, supra* (reviewing facial constitutional challenge to California statute, which could have been raised on direct review of trial court's injunction); *Mt. Vernon-Woodberry, supra* (reviewing claim that condemnation proceedings were unconstitutional for lack of a public purpose even though that claim could have been raised in an appeal from a final judgment of condemnation).

Nor, contrary to respondents' assertion (Opp. 12), has the Court limited this principle to cases in which the mandamus or prohibition proceeding "conclusively determined the constitutional limits of a lower court's jurisdiction." In fact, several of the cases cited above or in the petition did not involve challenges to the jurisdiction of the lower court. See, *e.g.*, *Weston, supra*; *Detroit & M. Ry., supra*; *Board of Educ. v. Superior Court*, 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers).

The four Supreme Court cases cited by respondents (at Opp. 8, 11) — *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548 (1945); *Department of Banking v. Pink*, 317 U.S. 264 (1942); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947); and *Gillette Co. v. Miner*, 459 U.S. 86 (1982) — provide no support for their jurisdictional argument. None of these cases involved prohibition or mandamus proceedings. Instead, each involved the entirely different question of when or whether a state supreme court decision rendered on *direct review* was "final." For example, in *Gospel Army*, this Court held that it lacked jurisdiction to review a decision of the California Supreme Court on direct review remanding a case for a new trial. By contrast, in a companion case not mentioned by respondents, the Court held that it *did* have jurisdiction to review the California Supreme Court's denial of a writ of prohibition. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-568 (1947).

Respondents' quotations of snippets from Illinois cases (Opp. 8-9) are no more helpful. Four of their cases — *Branch v.*

European Autohaus, Ltd., 424 N.E.2d 6 (Ill. App. Ct. 1981); *Flores v. Dugan*, 435 N.E.2d 480 (Ill. 1982); *O'Hara v. State Farm Mut. Auto. Ins. Co.*, 484 N.E.2d 834 (Ill. App. Ct. 1985); and *South Chicago Community Hosp. v. Industrial Comm'n*, 254 N.E.2d 448 (Ill. 1969) — addressed the question whether a trial court's ruling was final for purposes of appellate review. The fifth — *Relph v. Board of Educ.*, 420 N.E.2d 147 (Ill. 1981) — held that an intermediate appellate court's decision remanding a case to the trial court was not final for *res judicata* purposes. This case, by contrast, involves the Illinois Supreme Court's denial of mandamus/prohibition/writ of supervision, which manifestly is a final judgment in an independent proceeding.

2. *The claimed existence of an independent and adequate state ground.* Because the Illinois Supreme Court did not issue an opinion, respondents suggest (Opp. 12-13) that they are entitled to a presumption that the court denied mandamus/prohibition on some unspecified independent and adequate state ground. They have the presumption precisely backwards. Because the order denying mandamus/prohibition does not contain a "plain statement" that it was based on state grounds, the "conclusive presumption" is that it was not. *Harris v. Reed*, 489 U.S. 255, 261-262 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985); *Michigan v. Long*, 463 U.S. 1032, 1040-1042 (1983). The fact that the Illinois Supreme Court's order was a summary disposition is beside the point. When, as here, the federal issues were raised and decided in the trial court, a summary disposition in the appellate court cannot immunize the appellate court's judgment from review. See, *e.g.*, *Mix, supra* (reviewing and reversing Michigan Supreme Court's unexplicated judgment denying a writ of prohibition where federal claim was raised and rejected in the trial court).

3. *Need for interlocutory review.* Respondents contest as unsubstantiated (Opp. 14-15 & n.11) our contention that nationwide class actions are rarely tried to a verdict and suggest that there therefore is no need for interlocutory review of the orders in this case. As the Chamber of Commerce points out (Am. Br. at 11 n.7), however, studies show that certified class actions are more than twice as likely to settle as putative class actions that are not certified. Moreover, respondents mischaracterize the *Masonite* case,

which we cited as an example of this phenomenon. That case (in which the undersigned firm served as Supreme Court counsel) settled on the eve of the second phase of a planned multi-phase trial after the Alabama Supreme Court refused to decertify the class notwithstanding a federal court's conclusion that the first phase, which was limited to resolving a single issue under five different amalgamated standards, demonstrated the unmanageability of the case as a class action (see *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 426 n.19 (E.D. La. 1997)).

Respondents also suggest (Opp. 16) that State Farm's decision to pursue an original proceeding in the Illinois Supreme Court rather than seek a discretionary appeal immediately after the initial certification somehow makes this case less appropriate for review. Not only does that argument lack support in precedent or reason, it also ignores the fact that State Farm *did* request a discretionary appeal immediately after the trial court adopted class counsel's notice plan. Despite the fact that close to a year remained before trial, the trial court refused to certify an appeal of either the amended certification order *or* the day-old notice order, accepting respondents' argument that the case was too close to trial and that respondents had committed funds in reliance on the newly minted notice order. State Farm can hardly be faulted for having (accurately) predicted that a court that had signed respondents' proposed class certification order with nary a change would be unlikely to authorize a permissive appeal.[2]

4. *Choice of law*. Respondents assert (Opp. 3, 18, 19) that the circuit court never made a choice-of-law determination and hence that review by this Court would be premature. That assertion

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[2] Respondents are simply wrong in suggesting (Opp. 16) that the procedure for interlocutory review under Illinois Supreme Court Rule 308 is equivalent to the procedure contemplated in the proposed Fed. R. Civ. P. 23(f). Rule 308, like 28 U.S.C. § 1292(b), affords the trial court an absolute veto; the proposed federal rule would remove the veto power and give appellate courts the discretion to determine whether to hear the interlocutory appeal. There also is no basis for respondents' assertion (Opp. 16) that we are seeking "an order from this Court legislating the mandatory review of class certification orders." We merely ask this Court to exercise its *discretion* to grant review in *this* case.

is based on a misleading quotation from the circuit court's opinion. While, in the quoted material, that court did reserve decision about whether the law of Illinois could be applied to each class member's *breach of contract* claim, it elsewhere unambiguously held that there was no constitutional impediment to the pursuit of an Illinois CFA claim by class members nationwide. See Pet. App. 10a-11a. It is the latter ruling that was the subject of the mandamus/prohibition proceeding and that is the basis for the first issue in the petition.

Respondents' contention (Opp. 18 & n.14) that State Farm is relying on arguments here that it did not make in the trial court fails to perceive the difference between arguments and authorities on the one hand and "claims" on the other hand. State Farm squarely raised the constitutional choice-of-law claim; the fact that it has subsequently added to the authorities cited in support of that claim is no impediment to review. *Yee v. City of Escondido*, 503 U.S. 519, 534-535 (1992).[3]

Nor is there any validity to respondents' assertion (Opp. 19-20) — which they did not make in the trial court and which was not the basis of that court's ruling — that State Farm failed to demonstrate the existence of a "true conflict." To begin with, by focusing exclusively on our discussion of the various state laws relating to non-OEM parts, respondents conveniently gloss over our showing below that the consumer fraud laws of the different states vary materially. See State Farm's Proposed Conclusions of Law on Plaintiffs' Motion for Class Certification ¶¶ 88-89 (Nov. 17, 1997).[4]

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[3] The suggestion (Opp. 18 n.14) that the sovereignty discussion in *BMW* is based exclusively on the Commerce Clause (which State Farm did not separately identify as a source of the constitutional limitation on choice-of-law) is plainly incorrect. In the relevant section of the *BMW* opinion, the Court cited a variety of cases that were predicated upon the Due Process Clause, the Full Faith and Credit Clause or on the structure of the Constitution as a whole. See 517 U.S. at 571 & n.16 (citing *Bonaparte v. Tax Court*, 104 U.S. 592 (1881); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914); *Huntington v. Attrill*, 146 U.S. 657 (1892)).

[4] As State Farm pointed out to the circuit court (*id.* ¶ 89), it is widely accepted that state consumer fraud causes of action vary materially, making certification of a nationwide class action inappropriate. See, *e.g.*,

Moreover, respondents are wrong in contending (Opp. 19-20) that they have structured their case so as to render irrelevant the myriad differences in the state laws relating to non-OEM parts. The numerous States that permit, encourage or require the use of non-OEM parts that are comparable in quality to their OEM counterparts necessarily have made a judgment that such parts actually exist. Otherwise the enactment of legislation and/or regulations by some three dozen States authorizing their use would have been an utterly meaningless act. These States must necessarily have a very different understanding of the meaning of "like kind and quality" than the one respondents will attempt to urge on the trial court as a matter of Illinois law.

As the amicus briefs of Public Citizen et al., New York and Pennsylvania, Nevada and Massachusetts, and NCOIL all reflect, each State has balanced the considerations relating to the use of non-OEM parts in its own particular way. It would trump the rights of the other States to permit a judge in Illinois to apply Illinois law in a way that would effectively preclude the use of non-OEM parts in those other States.[5]

In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350-351 (D.N.J. 1997); *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997). Since the time of that filing, two Illinois federal courts have expressed the same conclusion. *Fisher v. Bristol-Myers Squibb Co.*, 1998 WL 299798, at *6 (N.D. Ill. May 28, 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 497-498 (N.D. Ill. 1998).

[5] Respondents' assertion (Opp. 2 n.1, 19 n.16) that, if they prevail, State Farm would not have to discontinue specifying the use of non-OEM parts disregards their own request for relief, which includes "[a]n Order enjoining State Farm * * * *from refusing to pay for original equipment parts* * * *." Second Amended Class Action Complaint (A) at 13 (emphasis added). What is more, respondents' suggestion is fanciful. Particularly in today's litigation climate, no rational insurer would continue specifying non-OEM parts after a ruling in a nationwide class action that such parts are not of like kind and quality and are inherently incapable of restoring a vehicle to its pre-loss condition. That is why Public Citizen et al., NAIC, and the state amici, who respondents admit are thoroughly familiar with their claims in this case (see Opp. 3 n.2), all are of the view that, if not decertified, this class action presents a very real threat of squelching the use of non-OEM parts nationwide.

5. *The use of the class action to alleviate the class's burden of proof and abrogate State Farm's right to defend.* In response to our contention that the trial court's certification order conflicts with cases holding that the class action device may not be used to alleviate the class's burden of proof or prevent the defendant from raising individualized defenses, respondents offer little more than an argument on the merits (and an unpersuasive one at that). They suggest no reason why the Court should not definitively resolve the issue. Since we filed the petition, the conflict on this issue has deepened. In one case, cited by respondents, the Ohio Supreme Court reversed a trial court's denial of class certification, concluding that a class-wide inference of reliance and an objective standard for the existence of a class-wide fiduciary duty could be used to obviate the need to put on individualized evidence. *Cope v. Metropolitan Life Ins. Co.*, 696 N.E.2d 1001 (Ohio 1998).[6] By contrast, the Fourth Circuit recently overturned a class certification, stating: "It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members. Thus courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk * * * of a composite case being much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 1998 WL 512926, at *14 (4th Cir. Aug. 19, 1998) (citation omitted). See also *Small v. Lorillard Tobacco Co.*, 1998 WL 398176, at *7 (N.Y. App. Div. July 16, 1998) (decertifying five million member tobacco class action in part because "[d]efendants have a due process right to cross-examine each [class] member, a task that would take hundreds of years").

As these cases reflect, the question presented here is an extremely important one that recurs in class action litigation. The present case would be an especially good one in which to resolve that question. With five million class members, 33,000 different

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[6] Respondents also note (Opp. 22) that two state courts certified statewide non-OEM class actions. Those cases conflict with the more recent decisions of federal courts in Tennessee and Alabama and a different Illinois state court refusing to certify similar class actions on the ground that class members' claims could not be adjudicated by means of common proof. See Pet. 18 & n.10.

crash parts,[7] and vehicles of every possible pre-loss condition, it is inconceivable that State Farm's specification of non-OEM parts has never once been sufficient to restore a class member's vehicle to pre-loss condition. Yet respondents' all-or-nothing "common evidence" approach necessarily would result in either an across-the-board exoneration for State Farm or a class-wide finding of liability and an award of damages to each of the five million class members. The question whether due process permits the use of the class action device to provide damages to those who could not possibly prove that they were injured (and, conversely, whether it permits extinguishment of the claims of class members who *could* make an individualized showing of injury), is starkly presented here and warrants resolution.

6. *Notice*. We asserted in the petition that the trial court's notice order cannot be squared with this Court's consistent pronouncement that publication notice is an inadequate substitute for mailed notice. In response, respondents insist (Opp. 24-30) that the Court has never held that mailed notice must always be given in lieu of publication notice, that publication notice (if done the way they did it) is better than mailed notice, and that publication notice is constitutionally sufficient whenever the mailing list is not completely accurate. While we disagree strongly with these arguments, they all support granting review, not denying it. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts must continue following this Court's precedents and leave prerogative of overruling them to this Court). So too does respondents' citation of *Cartt v. Superior Court*, 124 Cal. Rptr. 376 (Cal. App. 1975), which demonstrates that the question whether and when publication notice may constitutionally be substituted for mailed notice is a recurring and important one.

In any event, respondents' defense of the circuit court's ruling is based on distortions of the relevant facts. First, respondents' representation (Opp. 4, 27, 29) that State Farm wanted to send

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[7] Respondents' reference (Opp. 2) to 25 crash parts is highly misleading. There are 25 *categories* of crash parts (*e.g.*, fenders, hoods, *etc.*), but, because there are myriad makes and models of cars and numerous different manufacturers of parts, there are a total of over 33,000 unique crash parts implicated in this litigation.

mailed notice to an "inaccurate" list is misleading. The inaccuracy to which respondents advert stems solely from the unavoidable fact that people sometimes change addresses, something that always has been true but which never before has been deemed a reason for dispensing with an effort to provide actual mailed notice. As the amici point out, respondents' argument may warrant *supplementing* with publication notice in an effort to reach class members for whom State Farm lacks a current mailing address but it does not justify denying actual mailed notice to the more than a million class members for whom State Farm does have current addresses. See Public Citizen et al. Am. Br. 9-10; Washington Legal Foundation et al. Am. Br. 13.

Second, the suggestion that the trial court's decision not to require mailed notice was vindicated because the publication notice "reached" 78% of the class is based upon a misleading use of the term "reach." As respondents' own so-called notice expert acknowledged, in the advertising industry the term "reach" refers to the number of persons who "opened or read" *the publication* containing the advertisement (Affidavit of Todd B. Hilsee ¶¶ 11-13 (Nov. 21, 1997)); the "reach" data shed no light on the number of people who actually noticed and read *the advertisement*. Thus, a class member who might have purchased *People* magazine (or even skimmed it in the doctor's office) would be included in the reach statistics. Respondents make no claim as to how many class members actually saw and read the class notice — and for good reason. Of the five million class members, only 15 — a paltry .0003% of the class — opted out. Declaration of Scott P. Nealey Regarding the Response of Class Members to the Notice Program ¶ 6 (July 9, 1998). By contrast, 3,400 of the 28,000 class members in *Shutts* (*i.e.*, 12% of the class) opted out (even though the average claim was a mere $100 (472 U.S. at 801)), supporting this Court's conclusion that due process was satisfied by the combination of mailed notice and an opt-out right. *Id.* at 813. That only a minuscule number of class members opted out here, notwithstanding the pro-consumer nature of the practice under attack, illustrates the absurdity of respondents' suggestion that publication notice was as good or better than an actual mailed notice. See Public Citizen et al. Am. Br. 8, 10.

Respectfully submitted.

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